Supreme Court, U.S.
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No. 88-1557

In The

Supreme Court of the United States

October Term, 1988

HILLVIEW ESTATES, LTD.,

Petitioner,

vs.

MO-CON VENTURES, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District, Sixth Division

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The only question presented for review by the Petition for Writ of Certiorari should properly be phrased as follows:

1. Did the California Court properly apply California Code of Civil Procedure Section 583.360 in dismissing Petitioner's Superior Court Complaint because Petitioner failed to carry its burden of proving its diligence in all stages of the proceeding where Petitioner made its first motion for trial setting five years and 37 days after Petitioner filed the Complaint?

LIST OF PARTIES

The parties to this proceeding are: HILLVIEW ESTATES, LTD., a California limited partnership; MO-CON VENTURES, INC., GAP DEVELOPMENTS, INC., TWO C MOBILE HOME SALES, INC., SECURITY PACIFIC NATIONAL BANK, a national banking association, CHARLES GILLIARD, JOSEPH R. ALSIP, JR., DALE R. WILSON, ROBERT PLACENCIA, CARROLL D. COURTNIER, EDWARD A. SKIFSTROM, L. R. GABRIELSEN, as Executor of the Estate of Lyman R. Smith, Deceased, ROBERT D. PATTERSON, and EQUITABLE DEED COMPANY, a California corporation. The parent corporation, subsidiaries and affiliated corporations of Respondents SECURITY PACIFIC NATIONAL BANK and EQUITABLE DEED COMPANY are:

Parent Corporation

Security Pacific Corporation

Subsidiaries and Affiliated Corporations

AF, Cargo, Inc.

AF, Freight, Inc.

American Ventures

Atlantic Century Advisers, Inc.

Banco Denasa de Investimento "Denasa"

Banco Security Pacific

Boavista Brazilian Conventional Fund

LIST OF PARTIES (Cont.)

Broadgate Asset Management Limited

Burns Fry Hoare Govett Inc.

Canton Pacific Finance Limited

Canton Pacific Fund Managers Limited

Canton Pacific Nominees Sdn. Bdh.

Canton Pacific Systems Limited

Caribbean Marketing Holdings, Inc.

Caribbean Tourism Holdings, Inc.

Chilgener

China International Finance Company Ltd.

Desturpac

Desturcar

Eden Isles, Inc.

Emerald Corporation

Enersis or Chilmetro

FM Mineral Holdings, Inc.

First Small Business Investment Co. of California

Fulcrom Media Ltd.

GN Mineral Holdings, Inc.

Golf Course, Inc.

LIST OF PARTIES (Cont.)

Hong Kong & Shanghai Insurance Company Limited

InterQuant Capital Advisors Ltd.

Inversiones Financieras Security Pacific Chile S.A.

Lakeside Marketing Company

Leisures Creations

Mexvilla

M & W Resources, Inc.

NBNE

NDC Securities Limited

PNB Securities Corp.

Pacific Century Advisers, Inc.

Pacific Marketing Holdings, Inc.

Pacific Southwest Realty Company

Pacific Tourism Holdings, Inc.

Permit Production Company, Inc.

SECTRAS Corporation

SPAA Leasing, Inc.

SPAC (UK) Corporation

SPBB Leasing, Inc.

SPCC Leasing, Inc.

LIST OF PARTIES (Cont.)

SPFSS, Inc.

Sardonyx Corporation

Security Pacific Asian Bank Limited

Security Pacific Australia Limited

Security Pacific Bank A.G.

Security Pacific Bank Canada

Security Pacific Bank S.A.

Security Pacific Bank & Trust Company (Bahamas) Limited

Security Pacific Capital Australia Limited

Security Pacific Capital Markets Limited

Security Pacific Chile Energia S.A.

Security Pacific Chile S.A.

Security Pacific Chile Valores S.A.

Security Pacific Corporate Services Ltd.

Security Pacific Discount Brokerage Services, Inc.

Security Pacific Do Brazil S/C Ltda

Security Pacific Equipment Finance (Europe) Inc.

Security Pacific Equipment Leasing, Inc.

Security Pacific Finance, Limited

LIST OF PARTIES (Cont.)

Security Pacific Financial Futures, Inc.

Security Pacific Financial Software International, Inc.

Security Pacific Financing Services Limited

Security Pacific Foundation

Security Pacific Futures, Inc.

Security Pacific Hoare Govett Asia Limited

Security Pacific Hoare Govett (Delaware) Limited

Security Pacific Hoare Govett, Inc.

Security Pacific Hoare Govett Limited

Security Pacific Holdings, Inc.

Security Pacific Holdings, S.A.

Security Pacific Hong Kong Holdings Limited

Security Pacific Industrial, Limited

Security Pacific International Bank

Security Pacific International Trade Corporation

Security Pacific Investment Group, Inc.

Security Pacific Investments, Inc.

LIST OF PARTIES (Cont.)

Security Pacific Lease Finance (Europe) Inc.

Security Pacific Limited

Security Pacific Midwest, Inc.

Security Pacific National Leasing, Inc.

Security Pacific New Zealand Limited

Security Pacific Nominees Ltd.

Security Pacific Overseas Corp.

Security Pacific Overseas Investment Corporation

Security Pacific Overseas Investment Corporation BET Gmbh

Security Pacific Overseas Investments Ltd.

Security Pacific Private Capital (Asia) Ltd.

Security Pacific Regional Holdings Limited

Security Pacific Securities Australia Ltd.

Security Pacific Switzerland SA

Security Pacific Trade Finance, Inc.

Security Pacific Trade Finance, Ltd.

Security Pacific Trust (Bahamas) Limited

Security Pacific Video Services, Inc.

LIST OF PARTIES (Cont.)

The Bank of Canton Limited

The Bank of Canton Limited Macao

The Cartwell Syndicate Limited

The Phillipine Fund

Tyrol, Inc.

Videofinancial Services

Villamex

Zedd Investments, Inc.

Zentac Investments, Inc.

Zentac Productions, Inc.

County Service Co.

Security Pacific Commodity Trading Advisors, Inc.

Security Pacific Datacorp.

Security Pacific Commission Merchant, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES x

I NO REVIEWABLE QUESTION IS PRESENTED ... 1

II THE PETITION FOR WRIT OF CERTIORARI DOES NOT SHOW UNITED STATES SUPREME COURT JURISDICTION 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc. (1983) 143 Cal. App. 3d 791, 192 Cal. Rptr. 169 4

General Motors Corp. v. Superior Court (1966) 65 Cal.2d 88, 52 Cal. Rptr. 460 4

Moore v. Powell (1977) 70 Cal. App. 3d 583, 138 Cal. Rptr. 914 2

Moran v. Superior Court (1983) 35 Cal.3d 229, 197 Cal. Rptr. 546 4

Price v. Grayson (1969) 276 Cal. App. 2d 50, 80 Cal. Rptr. 602 2

Rodde v. Trousdale Construction Co. (1959) 276 Cal. App. 2d 419, 80 Cal. Rptr. 774 2

Rose v. Knapp (1951) 38 Cal.2d 114, 237 P.2d 981 4

Woley v. Turkus (1958) 51 Cal.2d 402, 334 P.2d 12 4

STATUTES

U.S. Const., amend. XIV 2, 3,

28 U.S.C. § 1257(3) 3, 5

California Code of Civil Procedure Section 583.310 1

California Code of Civil Procedure Section 583.340 1

California Code of Civil Procedure Section 583.360 1

California Rules of Court, Rule 209 1

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

NO REVIEWABLE QUESTION IS PRESENTED

California Code of Civil Procedure Section 583.310 provides: "An action shall be brought to trial within five years after the action is commenced against the defendant." California Code of Civil Procedure Section 583.360 provides for mandatory dismissal if the action is not brought to trial within five years. California Code of Civil Procedure Section 583.340 provides for tolling the five-year period under certain circumstances.

This Plaintiff/Petitioner made no effort to have this case tried within five years of the date of filing, never filed the at-issue memorandum required by California Rules of Court Rule 209[1] as a condition precedent to the Court's assigning a trial date, and waited until five years and 37 days had passed before bringing on its motion to specially set the case for trial. [Petition for Writ of Certiorari, p. 8.]

The Petitioner now presents a petition to this Court requesting factual findings regarding the Petitioner's diligence or lack of diligence during a certain 81-day period during 1982, which period in any event expired more than four years before the case was dismissed for lack of prosecution in 1987.

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[1] "Rule 209. Memorandum that civil case is at issue (a) [Contents of at-issue-memorandum]. No civil case shall be placed on the civil active list or be set for a trial until it is at issue and a party has served and filed an at issue memorandum stating (1) the title and number of the case; . . . ".

The petition ignores California case law which consistently holds that it is the duty of the plaintiff at all stages of the proceeding to use due diligence in order to prevent the application of the mandatory dismissal provisions. *Moore v. Powell* (1977) 70 Cal. App. 3d 583, 590, 138 Cal. Rptr. 914; *Price v. Grayson* (1969) 276 Cal. App. 2d 50, 53, 55, 80 Cal. Rptr. 602; *Rodde v. Trousdale Construction Co.* (1959) 276 Cal. App. 2d 419, 80 Cal. Rptr. 774.

The petition presents no question which is reviewable by this Court. The questions as framed in the petition attempt to state a violation of due process when the California Court of Appeal upheld the trial court's findings "in egregiously misstating the evidence" regarding the Petitioner's failure to move diligently to have counsel appointed in the bankruptcy court. That is the only claim in the eight "issues" stated in the petition which mentions an issue which could come within the purview of this Court: denial of due process under the Fourteenth Amendment to the Constitution of the United States.

Issues 5 and 6 as stated in the petition, however, do not claim that the Petitioner did not have a fair hearing. Petitioner claims that the trial court's evidentiary findings that Petitioner failed to carry its burden of proving diligence at all stages of the proceeding were so outrageous that the Petitioner was denied due process. Put another way, Petitioner has lost on the evidence and claims that the California Court made such a bad decision on the evidence that the evidentiary findings amounted to a denial of due process.

While the evidence before the trial court clearly showed that the Petitioner was not diligent during any

part of the five-year period within which it could have brought its case to trial, even if there had been some evidence which would have allowed the trial court to find that the Petitioner had carried its burden of proof, the Petitioners' claim would still not show a denial of due process. Petitioner had a hearing before a disinterested magistrate, appeared, presented evidence, failed to carry its burden of proof, and lost. In no sense can the claim be termed a denial of due process under the Fourteenth Amendment. Accordingly, no reviewable question is raised in the petition for writ of certiorari.

II

THE PETITION FOR WRIT OF CERTIORARI DOES NOT SHOW UNITED STATES SUPREME COURT JURISDICTION

The Petitioner's jurisdictional statement cites 28 U.S.C. § 1257(3) for this Court's jurisdiction. It then cites the Fourteenth Amendment to the Constitution of the United States and miscellaneous provisions of federal and state law as the "statutes involved".

The petition for writ of certiorari does not challenge the validity of any state or federal statute. Accordingly, the petition completely fails to show jurisdiction under which a writ of certiorari could be issued.

The Petitioner's arguments rest on the fallacious assumption that this Court may redetermine the facts which led the California court to conclude that the Petitioner failed to carry its burden of proving that it was diligent at all times during the five-year period in seeking

to have the case brought to trial. The law under consideration is set forth by the California courts as follows:

> "The burden is on plaintiffs to first establish in the trial court, by clear and convincing proof, the existence of either impossibility, impracticability, or futility of bringing the matter to trial within five years. Absent such a showing, the five-year statute applies without any further consideration or determination of prejudice." *Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc.* (1983) 143 Cal. App. 3d 791 at 796; 192 Cal. Rptr. 169.

> "What is impossible, impracticable or futile must be determined in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. (*General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 96, 52 Cal. Rptr. 460; *Woley v. Turkus* (1958) 51 Cal.2d 402, 407, 334 P.2d 12, *Rose v. Knapp* (1951) 38 Cal.2d 114, 117, 237 P.2d 981.) The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case." *Moran v. Superior Court* (1983) 35 Cal.3d 229, 238, 197 Cal. Rptr. 546.

Even if it were inclined to determine whether or not the Petitioner had carried its burden of proof, this Court has no jurisdiction to review the final decision of a California trial court which held that on the evidence, this Petitioner failed to carry its burden of proving due diligence and that this action is subject to dismissal for Petitioner's failure to diligently prosecute.

IV

CONCLUSION

The petition fails to show any question which would give jurisdiction to this Court under 28 U.S.C. § 1257(3). The only questions raised are factual questions which have been finally established by a California trial court and affirmed on appeal by the California Court of Appeal. No reviewable question is properly placed before this Court and accordingly Respondents respectfully submit that the petition for writ of certiorari should be denied.

Dated: April 12, 1989

By ROBERT LOUIS FISHER

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APPENDIX

California Code of Civil Procedure § 583.310

"An action shall be brought to trial within five years after the action is commenced against the defendant."

California Code of Civil Procedure § 583.340

"In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) the jurisdiction of the court to try the action was suspended.

(b) prosecution or trial of the action was stayed or enjoined.

(c) bringing the action to trial, for any other reason was impossible, impracticable, or futile."

California Code of Civil Procedure § 583.360

"(a) an action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) the requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."